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No. 90-55

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

ILLINOIS WINE & SPIRITS CO.,

*Petitioner,*

v.

THE COUNTY OF COOK,
BUREAU OF ADMINISTRATION,
and WILLIAM M. DOYLE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Illinois Appellate Court, First District**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Whether the Respondent County of Cook may enforce a duty to collect liquor taxes against Petitioner, a wholesale alcoholic beverage dealer, by compelling payment, where the Petitioner either failed or refused to collect the taxes, and where the County liquor tax ordinance reasonably classifies various types of liquor dealers and therefore comports with the equal protection requirements of the Fourteenth Amendment.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondent County of Cook, a body politic and corporate of the State of Illinois, the Bureau of Administration and William M. Doyle, Chief Administrative Officer, respectfully requests that the Petition for Writ of Certiorari be denied.

## STATEMENT OF THE CASE

On July 20, 1982, Illinois Wine & Spirits Co. ("IWS")[1] filed suit in the Circuit Court of Cook County, Illinois,

[1] IWS is a business engaged in selling alcoholic beverages at wholesale. The business is located in Will County, Illinois, the county immediately south, adjoining Cook County.

seeking declaratory and injunctive relief to bar Cook County's efforts to collect liquor taxes plus accrued interest assessed against IWS on the wholesale sale of alcoholic beverages to retail alcoholic beverage dealers doing business in Cook County. Cook County[2] filed a counter-claim seeking enforcement of its liquor taxing ordinance and for collection of the taxes due thereunder.

Cook County's ordinance provides for a tax on the retail sale of alcoholic beverages. While the ultimate incidence of the tax falls on the retail consumer, the retail dealer prepays the tax to the wholesale dealer at the time liquor is purchased from the wholesaler. The wholesale dealer has the duty to collect the tax and transmit it to Cook County.

The principal issue throughout this case has been whether Cook County may compel an out of county wholesaler to collect and pay taxes on the sale of alcoholic beverages to retail dealers in Cook County. IWS either failed or refused to collect the taxes, and in defense raised numerous state law grounds, as well as the equal protection argument raised herein. These questions were initially decided by the Circuit Court of Cook County on cross-motions for summary judgment supported by affidavits and deposition testimony.

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[2] Cook County is a body politic and corporate of the State of Illinois, existing as a home rule unit of local government under Article 7, section 6a of the 1970 Illinois Constitution. Pursuant to its home rule authority, Cook County adopted an ordinance on May 5, 1975, imposing a tax on the retail sale of alcoholic beverages. The Respondent Bureau of Administration, through its Chief Administrative Officer, William M. Doyle has responsibility for administering enforcement of the ordinance. The ordinance is fully set forth in the Appendix to the Petition at A-49.

In ruling on the cross-motions for summary judgment, the Circuit Court rejected each of IWS's state and federal arguments finding that IWS had an enforceable duty to collect taxes on behalf of Cook County, and that IWS was therefore liable for payment of taxes plus accrued interest.[3] A trial was thereafter held solely to establish the amount of tax plus accrued interest due. On July 10, 1987, a judgment was entered for $154,729.12 in favor of Cook County.

IWS appealed all previously raised state and federal issues to the Illinois Appellate Court, First Judicial District. No issue was raised on appeal as to the correctness of the amount of the monetary judgment.[4] The Appellate Court affirmed on all issues and found on the issue of equal protection, that IWS had failed to set forth any evidence of invidious discrimination.[5] IWS thereafter sought rehearing in the Illinois Appellate Court, again raising the equal protection claim, asking the Court to reconsider the legal relevance of the identical "facts" offered herein as evidence of discrimination. The petition for rehearing was denied on January 2, 1990. IWS filed a Petition For Leave To Appeal to the Illinois Supreme Court. Leave to appeal was denied on April 4, 1990.

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[3] The unreported opinion of the Circuit Court of Cook County, County Department Chancery Division (O'Brien, J.) is reprinted in the Appendix to the Petition for Writ of Certiorari at A-26.

[4] An appeal bond was posted by IWS for 1½ times the amount of the judgment. The bond remains in effect.

[5] The opinion of the Illinois Appellate Court, First Judicial District is reported at 191 Ill.App. 3d 924, 548 N.E. 2d 416 (1989).

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I.

### RESPONDENT COOK COUNTY MAY ENFORCE THE DUTY TO COLLECT LIQUOR TAXES BY COMPELLING PAYMENT OF TAXES NOTWITHSTANDING THE FAILURE OF THE PETITIONER TO COLLECT TAXES.

Certiorari should be denied on grounds that the petition raises no substantial question of federal law. In its simplest form, the only question addressed by the Petitioner is whether the equal protection clause may be used as a shield to prohibit enforcement of an otherwise valid local taxing ordinance against a clearly identified subject of the taxing ordinance. To reach the Petitioner's issue, this Honorable Court is being asked to exercise its extraordinary discretionary jurisdiction to review the Illinois court's construction of Cook County's ordinance wherein the Illinois court determined that wholesale and retail alcoholic beverage dealers are separately classified by the ordinance each with distinct tax collection duties, with the primary duty to pay collected taxes placed on the wholesale dealer. Respondent contends that these questions do not implicate the equal protection clause, and further that the decision of the Illinois court is consistent with this Court's prior decisions. Clearly, Petitioner's argument must fail.

The law is well settled that government has broad freedom to devise tax programs which respond to local needs. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406 (1940), *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001 (1973). Moreover, where taxation is concerned, and no specific federal right apart from equal protection is imperiled, this Court has held that states have great

leeway in making classifications and drawing lines which in their judgment will produce reasonable systems of taxation. *Lehnhausen*, 410 U.S. at 359, 93 S.Ct. at 1003. The construction given to such local taxing statutes by state courts is deemed to be conclusive for purposes of review by this Court, *Gurley v. Rhoden*, 421 U.S. 200, 95 S.Ct. 1605 (1975). So long as classifications rests on some reasonable consideration of policy there is no denial of equal protection. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 30 S.Ct. 578 (1910).

Petitioner's contention that enforcement of the tax collection duty by compelled payment impairs constitutionally protected rights is wholly without support. A similar argument has been rejected by this Court, finding that a wholesaler can be compelled to pay taxes despite failure or refusal to collect the taxes. This Court recognized that such a tax collection scheme imposes no financial burden on the wholesale dealer except in the isolated instance where the wholesaler fails to perform the tax collection duty. *Scripto v. Carson*, 362 U.S. 207, 211, 80 S.Ct. 619, 621 (1960). Cook County's ordinance, like the Florida statute at issue in *Scripto*, provides wholesalers an administrative fee for tax collection services, thus a wholesaler bears no cost, except where as here it fails to collect the tax.

In this case, the Illinois court has determined that Cook County's liquor taxing ordinance classifies wholesale and retail alcoholic beverage dealers separately as tax collectors, and further that the ordinance imposes primary tax collection duties on wholesale dealers, not on retailers. *Illinois Wine & Spirits Co. v. County of Cook*, 191 Ill. App. 3d 924, 929 (1989). The unrebutted testimony of the county auditor is evidence of the policy which underlies the Respondent's legislative judgment to impose collection duties on wholesale dealers. The Petitioner presented no evidence

to the Circuit Court, nor did it argue in the Appellate Court that imposing the primary duty of tax collection on wholesale dealers as a class, did not have a rational basis.

Petitioner cites numerous authorities in its petition. (pp. 8-16). Not one of the cases cited however supports its position. Each of these cases is premised on the Court's concern for protecting some fundamental right or interest. Petitioner has wholly failed to assert what fundamental interest it possesses that rises to the level of constitutional concern.

The evidence in this case is unrebutted that Petitioner is a wholesale alcoholic beverage dealer, and that it sold taxable alcoholic beverage to retail dealers in Cook County. It is further unrebutted that Petitioner failed to collect the taxes due on those transactions, and that no tax attributable to those sales was paid to Cook County.[6] Contrary to Petitioner's assertions (Petition, p. 15), there is no evidence, only counsel's argument, that the County routinely seeks enforcement against retail dealers as a "normal procedure" for tax collection, or for that matter that the County routinely follows any other practice which is at variance from the enforcement action taken in this case. The county auditor testified without rebuttal, that it is the practice of the County to hold the wholesale dealer primarily liable for tax collection. (Trial transcript, 6-23-87, p. 8). The auditor stated that the County attempts

[6] While Petitioner would have this Court shift the duty of payment to Petitioner's retail dealer customers, Petitioner offered no evidence at trial that any of the retail dealers had been notified by Petitioner that Cook County taxes had not been charged. In fact, three retailers testified in depositions that they could not recall ever being advised by a wholesaler that Cook County taxes were not included in the cost of the invoiced liquor. The transcripts of these depositions are included in the Record of this case in support of the Respondent's cross-motion for summary judgment.

to collect taxes directly from a retail dealer only occasionally where it learns that the retail dealer has brought liquor into the County on which no tax has been paid. (Trial transcript, 6-23-87, p. 9). Petitioner failed to introduce any evidence, nor did it ever argue that deliveries of liquor herein at issue were made to retailers outside of Cook County, and the retailers themselves brought untaxed liquor into the county. Without such evidence Petitioner cannot now rely on a narrow enforcement exception into which it clearly does not fall.

Accepting as it must, that Respondent may impose a duty to collect taxes on wholesale alcoholic beverage dealers, the Petitioner rather amazingly suggests that enforcement of that duty offends the constitution. Equal protection protects against invidious discrimination by the state only for those who are similarly situated. *Ceichon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). Moreover, no court has expressly extended the concept of "selective prosecution" to prove invidious discrimination in the context of civil enforcement actions. The court in *Ceichon* noted that selective prosecution is permissible so long as it is not based on clearly impermissible discrimination such as discrimination based on race, religion, the exercise of first amendment rights or bad faith. *Ceichon*, 686 F.2d at 523, n. 16. Unlike *Ceichon* however, where two similarly situated paramedics involved in the same incident received disparate punishment, thus evidencing bad faith on the part of the City, there is no evidence that Petitioner and retail dealers were similarly situated pursuant to the plain terms of the ordinance as construed by the Illinois court.

Petitioner's argument in support of certiorari is premised solely on the contention that it has been singled out as an out of county wholesale dealer for enforcement action. No evidence however supports that position. The only

distinction between Petitioner and any other wholesale alcoholic beverage dealer (located either inside or outside Cook County), is that Petitioner failed or refused to collect taxes on sales made to retail alcoholic beverage dealers in Cook County.

There is simply no recognized federal right to be protected against a state's lawfully imposed tax collection duties. Petitioner's defenses and arguments were correctly considered and rejected by the Illinois court. Accordingly, the Petition for Writ of Certiorari should be denied.

## CONCLUSION

Respondent, County of Cook, the Bureau of Administration and William M. Doyle, Chief Administrative Officer, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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